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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

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No. 76-847

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JAMES H. TANAKA,

*Petitioner,*

v.

THE UNITED STATES,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF CLAIMS

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**PETITIONER'S REPLY MEMORANDUM**

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**PETITIONER'S REPLY MEMORANDUM**

The respondent in its memorandum in opposition raises issues which require immediate clarification by the petitioner to place the substance of his petition in proper focus.

1. Respondent states a conclusion<sup>1</sup> which is neither supported by the record before the court below<sup>2</sup> nor the

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<sup>1</sup> Memorandum in Opposition, p. 3, line 16 et seq.

<sup>2</sup> The administrative record submitted by petitioner to the Air Force Board for Correction of Military Records contained more than 200 pages, including more than 30 affidavits and certificates of respected senior military officers, many of General Officer rank, several of whom have volunteered to appear and testify at their own expense on behalf of the petitioner.

cases cited as authority therefor.<sup>3</sup> This Court in *Orloff v. Willoughby*, 345 U.S. 83, 93-94, conceded that:

"We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that *there is discrimination, favoritism, or other objectionable handling of men.*" [Emphasis added]

The issue sought to be reviewed herein is the *lack of due process* denied the petitioner. For nearly six (6) years, while he has continued on active duty in the Air Force with outstanding service in a variety of operational flying assignments, including extensive duty in Southeast Asia during the Viet Nam War, *he has been denied the opportunity to be heard in any forum, administrative or judicial*, to substantiate under oath his allegation of racial discrimination by an "unprincipled senior officer who openly ridiculed the Japanese people and detested his assignment to Japan".<sup>4</sup>

This is not an allegation that a *scrupulous judiciary* can ignore nor permit to be characterized as "orderly government"<sup>5</sup> and therefore "not to interfere".<sup>6</sup> On its face this is a direct violation of Executive Order 9981 of July 26, 1948.<sup>7</sup>

<sup>3</sup> The Court of Claims' cases cited by respondent are inapposite and clearly distinguishable from the facts here sought to be reviewed.

<sup>4</sup> Memorandum in Opposition, p. 3, lines 7-9.

<sup>5</sup> *Orloff v. Willoughby*, 345 U.S. 83, 93.

<sup>6</sup> *Ibid.*

<sup>7</sup> Petitioner, Appendix D, p. 7a.

2. Respondent misinterprets petitioner's purpose *in resigning his commission and enlisting as a sergeant*. His principal motivation was not "to protect his accrued retirement interest",<sup>8</sup> but to continue to serve the Air Force and to seek administrative redress *working within the system*.<sup>9</sup> For a native-born citizen of Japanese ancestry who had endured discrimination as a youth, this current rebuff was a matter of principle, not financial reward.<sup>10</sup>

3. The court below, on its own initiative (See Order, dated March 15, 1977, set forth verbatim in Appendix G, p. 31a, et seq.)<sup>11</sup> has introduced a series of fundamental issues, several of which are included in petitioner's "Questions Presented".<sup>12</sup>

While respondent determines that the court below acted correctly,<sup>13</sup> the court itself, two of the three judges partic-

<sup>8</sup> Memorandum in Opposition, p. 2, line 9.

<sup>9</sup> Petitioner at that point in his career with 14 years of service could have accepted the \$15,000.00 severance pay to which he would have been entitled (as most released officers in similar situations do), return to graduate school to finish his studies for a doctorate degree, were he not dedicated to clearing his otherwise unblemished military record and correcting an injustice which was an affront to him. It was a matter of personal pride, dignity and honor which to him is not compensable in terms of financial reward.

<sup>10</sup> Petition, Appendix E, pp. 9a-10a.

<sup>11</sup> To facilitate convenient reference along with the petition for certiorari, this Order has been reproduced in its entirety, identified as Appendix G and numbered page 31a et seq.

<sup>12</sup> Petition, pp. 2-3.

<sup>13</sup> Memorandum in Opposition, p. 3, lines 16 et seq.

ipating in the decision which the petitioner seeks to have reviewed by this Court, imply that *they are not so sure*.<sup>14</sup>

The Court of Claims' admitted deep *concern* is in sharp contrast to respondent's summary dismissal of petitioner's allegation of *lack of due process*.

In the light of respondent's failure directly to address the "Questions Presented", and the court below's admitted *concern*, the need for plenary review is imperative.

For the reasons stated above as well as those set forth in the petition for certiorari, petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

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March 21, 1977

# APPENDIX G

## IN THE UNITED STATES COURT OF CLAIMS

No. 157-74

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LARRY C. SANDERS

v.

THE UNITED STATES

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*Maurice F. Biddle*, attorney fo record for plaintiff, *Thomas H. King*, of counsel.

*R. W. Koskinen*, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

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Before NICHOLS, KUNZIG and BENNETT, Judges.

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## ORDER

This case was argued March 11, 1977. The court is concerned by the number of suits by officers discharged after being passed over by Selection Boards, its uncertainty as to the best interests of the Services in the premises, as as to its own proper role. In consideration of the importance of issues raised by this case in relation to other cases now pending, (e.g., *Guy v. United States*, No. 14-75 and *Riley v. United States*, No. 206-73) the court directs

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<sup>14</sup> Petitioner's Reply Memorandum, Appendix G, p. 31a.



that within 30 days of March 11 defendant file supplemental briefs setting forth its position on each of the questions stated below. Plaintiff may file his response to the court within 30 days of defendant's filing. Other interested parties may apply for leave to submit briefs stating their positions, as amici curiae, within the time allotted.

Defendant shall address the following questions:

1. Whether a Board for the Correction of Military Records, once it has determined that an officer's effectiveness report is defective and should be removed from his file, is further obliged by law to void any prior passovers for promotion that either (a) are shown to have resulted, or (b) could have resulted from the selection board's consideration of the defective effectiveness report.
2. Whether an officer who was passed over for promotion can and must show this court, in a suit for back pay and reinstatement, that he would have been selected for promotion by his selection board but for the existence of the legal error or injustice in the course of his review by the board; and if he cannot or need not make a "but for" showing, whether he must still adduce proof meeting some alternative test.
3. Whether this court may or should assume that a Correction Board's action directing the removal of an officer's effectiveness report was based on the board's conclusion that permitting the report to remain in the selection folder would have been legal error, rather than amounting only to an injustice, in the absence of specific statement.
4. Whether there is legal error in the failure to accord an officer a promotion selection review free of defective effectiveness reports.

5. Whether *Testan v. United States*, 424 U.S. 392 (1976), rev'g 205 Ct. Cl. 330, 499 F.2d 690 (1974), forecloses this court's jurisdiction to review Correction Board decisions where the sole allegation is the board's arbitrary and capricious refusal to relieve an injustice, *Duhon v. United States*, 198 Ct. Cl. 564, 461 F.2d 1278 (1972).

6. Whether there exists any procedure by which an officer may know of adverse effectiveness reports and may challenge them prior to their consideration by a promotion selection board, and if such a procedure exists, when it took effect.

7. Whether a Correction Board has afforded a sufficient remedy for career injury caused by an improper effectiveness report, if it merely removes such report from an officer's selection file, without providing, for the information of later selection boards, any explanation of previous passovers, if any, that may have been caused by such improper report, and of gaps in the apparent service record left by the removal thereof.

8. Whether, where the court deems plaintiff deserving of relief, the remedy properly should take the form of either plaintiff's reinstatement to active duty; the court's remand of the case for further consideration by the Secretary of the branch of service concerned, or by the Correction Board for that service, or by a specially constituted selection board for that service, or by some other agency; or some other form of relief.

BY THE COURT

/s/ PHILIP NICHOLS, JR.  
Judge, Presiding

Mar 15 1977